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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAIFUDDIN TARIWALA et al., Plaintiffs and Respondents. v. KEITH MARTIN MACK, Defendant and Appellant.	2d Civ. No. B286146 (Super. Ct. No. 56-2017-00501406-CU-OR-VTA) (Ventura County)

Saiffuddin Tariwala, Fnu Husaina and Shabbir Saifee (collectively "plaintiffs") are the owners of a single-family residence located on Los Robles Road in Thousand Oaks ("Tariwala Property"). Defendant Keith Martin Mack is the owner of a neighboring property on Los Robles Road ("Mack Property"). Plaintiffs claim an easement over Mack's driveway for ingress and egress to their property.

Plaintiffs brought this action against Mack after he blocked the driveway easement. The trial court issued a preliminary injunction preventing Mack from interfering with plaintiffs' use

of the easement. Mack, who is self-represented, contends the driveway easement was extinguished through the doctrine of merger and that the court erred by enforcing the easement pending resolution of this litigation. Based on the limited record presented, we conclude Mack has not met his burden of demonstrating an abuse of judicial discretion. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Mack and his mother purchased the Tariwala Property in 1974. Because the property is landlocked and does not have direct access to a public street, Mack and his mother obtained an 18-foot recorded driveway easement over the Mack Property for purposes of accessing Los Robles Road. The easement was originally created in 1966.

In 1980, Mack and his brother jointly purchased the Mack Property. It is undisputed that Mack acquired sole title to the Mack Property in 1994. It also is undisputed that after his mother died, Mack conveyed the Tariwala Property to himself in 2000. What is less clear is what occurred after those events. The trial court denied plaintiffs' request to take judicial notice of various property deeds and title documents on the basis that they were "not authenticated and not certified." The record reflects, however, that Tariwala attached most of those documents to his declaration in support of plaintiffs' application for a TRO.

Plaintiffs allege that at the time Mack obtained title to the Tariwala Property in 2000, he obtained a loan from First Nationwide Mortgage Corporation (FNMC) secured by a deed of trust recorded against that property. Both the deed of trust and the grant deed transferring the Tariwala Property to Mack were recorded on April 27, 2000. Plaintiffs claim the loan was secured

by both the Tariwala Property (Parcel 1) and the driveway easement (Parcel 2).

According to plaintiffs, FNMC's successor in interest, CitiMortgage, Inc., acquired the Tariwala Property through a nonjudicial foreclosure in 2011. The trustee's deed upon sale purportedly included both the Tariwala Property (Parcel 1) and the driveway easement (Parcel 2). After protracted litigation to evict Mack from the Tariwala Property, CitiMortgage, Inc. sold the property to plaintiffs. The grant deed conveying the property to plaintiffs describes both the Tariwala Property (Parcel 1) and the driveway easement (Parcel 2).

Shortly after plaintiffs purchased the Tariwala Property, Mack obstructed all access, ingress and egress over the driveway easement on the Mack Property. Mack installed a lock on the entry gate to the easement and blocked plaintiffs from accessing their home by placing trash, personal belongings, dilapidated cars, recreational vehicles and debris within the easement. Consequently, plaintiffs could not use the driveway easement to access their property or to move into their new home.

Plaintiffs filed a complaint to enforce the driveway easement under Civil Code section 809.[1] The complaint also sought preliminary and permanent injunctions. Plaintiffs applied ex parte for the issuance of a temporary restraining order (TRO) and a preliminary injunction. Following a hearing, the trial court issued a TRO and set an order to show cause hearing on the preliminary injunction request.

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[1] All further statutory references are to the Civil Code unless otherwise specified.

The preliminary injunction hearing was held on October 18, 2017. No court reporter was present. The trial court granted the request for a preliminary injunction and issued an order "prohibiting [Mack] from blocking Plaintiffs from ingress and egress to their property upon posting of undertaking in the amount of $1000." The court determined "[i]t is not at all clear that the easement was extinguished when [Mack] purchased the dominant tenement."[2] Mack appeals.

DISCUSSION

Standard of Review

"'In determining whether to issue a preliminary injunction, the trial court considers two related factors: (1) the likelihood that the plaintiff will prevail on the merits of its case at trial, and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. [Citation.]'" (*Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171, 1177; see Code Civ. Proc., § 526, subd. (a).)

Generally, the trial court's ruling on a request for a preliminary injunction rests in its sound discretion and will not be disturbed on appeal absent an abuse of discretion. (*Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 786-787.) An order granting or denying a request for a preliminary injunction may be reversed only if the trial court abused its discretion with respect to both the question of success on the merits and the question of interim harm. (See *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.)

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[2] A three-day court trial is scheduled to begin on February 25, 2019.

Likelihood of Success on the Merits

Mack contends the evidence does not support the trial court's finding that plaintiffs are likely to prevail on the merits of the case at trial. Mack maintains that when he and his brother acquired title to the Mack Property in 1980, he effected a merger and extinguishment of the driveway easement because he had an ownership interest in both that property and the Tariwala Property.[3]

The merger doctrine is codified in section 811, which states, in part, that "[a] servitude is extinguished: 1. By the vesting of the right to the servitude and the right to the servient tenement in the same person. . . ." Similarly, section 805 states that "[a] servitude thereon cannot be held by the owner of the servient tenement." These statutes "'avoid nonsensical easements -- where they are without doubt unnecessary because the owner owns the estate.'" (*Hamilton Court, LLC v. East Olympic, L.P.* (2013) 215 Cal.App.4th 501, 505 (*Hamilton Court*); *Beyer v. Tahoe Sands Resort* (2005) 129 Cal.App.4th 1458, 1475.)

A merger could not have occurred in 1980 because, at that time, the Tariwala Property was co-owned by Mack's mother. Mack cites no authority suggesting that his ownership interest in the Mack Property could extinguish his mother's interest in the driveway easement over that property. To the contrary, the possibility of a merger did not exist until 2000, when sole ownership of the Tariwala Property was granted to Mack. That

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[3] In portions of his brief, Mack contends the merger occurred in 1980. In other parts, he claims it occurred in 1984. The record reflects that Mack and his brother acquired title to the Mack Property in 1980.

appears to be the first time that title to the Tariwala Property and Mack Property was vested in the "same person." (§ 811.)

But application of the merger doctrine is not automatic. First, there must be a unity of interest. "'[T]he ownership of the dominant and servient estates must be coextensive and equal in validity, quality, and all other characteristics.'" (*Leggio v. Haggerty* (1965) 231 Cal.App.2d 873, 881-882.) Second, even if there is a unity of interest, courts will not extinguish an easement if the result would be inequitable, or when its application would result in an injustice, injury or prejudice to a third person. (*Ito v. Schiller* (1931) 213 Cal. 632, 635; *Beyer v. Tahoe Sands Resort*, *supra*, 129 Cal.App.4th at p. 1475. ["A court sitting in equity has broad powers to accept or reject a finding of ownership in the context of a claim of merger"].)

Relying upon *Hamilton Court*, the trial court found "[i]t is not at all clear that the easement was extinguished when [Mack] purchased the dominant tenement [i.e., the Tariwala Property]." *Hamilton Court* stands for the general proposition that where there is a security interest in the easement, that interest prevents extinguishment of the easement through merger. (*Hamilton Court*, *supra*, 215 Cal.App.4th at pp. 505-506.) As Justice Mosk noted in his concurring opinion, "To extinguish the interest of the beneficiary of a deed of trust or mortgage security by merger would 'jeopardize, if it did not wholly destroy, the stability of every [such] security.' [Citation.] In this case and most such cases, the holder of the security is not a party to the transaction giving rise to the merger doctrine. It would be inequitable under the circumstances here to extinguish the security rights of such a beneficiary of the deed of trust when that security holder has no control over the transaction upon

which extinguishment of the easement by the merger doctrine is claimed." (*Id.* at p. 507 (conc. opn. of Mosk, J.).)

Plaintiffs argue it would be inequitable to apply the merger doctrine in this case because on the same date Mack acquired his sole interest in the Tariwala Property, FNMC recorded the deed of trust securing a loan against that property. That deed of trust purportedly conveyed a security interest in both the Tariwala Property (Parcel 1) and the driveway easement (Parcel 2). Plaintiffs contend that if the merger doctrine were enforced, the lender would have had no security interest in the driveway easement, which is necessary to access the Tariwala Property, and that such a result would "'jeopardize,'" if not "'wholly destroy, the stability of [the] security.'" (*Hamilton Court*, *supra*, 215 Cal.App.4th at p. 507 (conc. opn. of Mosk J.).)

As plaintiffs note, "[a] determination of whether Mack ever acquired the unified interest required to extinguish the [d]riveway [e]asement under the merger doctrine requires a look into the chain of ownership and title for the two properties." Although the trial court denied plaintiffs' request to take judicial notice of the deed of trust and other title documents, Tariwala's declaration included most of the same documents. It is possible that the court considered those documents in issuing its ruling. It also is possible that other admissible evidence of the chain of ownership was presented at either the hearing on the request for a TRO or at the preliminary injunction hearing. No reporter's transcript was provided because the parties did not employ a court reporter to record either hearing. Mack also did not seek the preparation of a settled statement to assist this court. (See *Leslie v. Roe* (1974) 41 Cal.App.3d 104, 108; Cal. Rules of Court, rules 8.134 & 8.137.)

The appellant "bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the [appellant]." (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Without a reporter's transcript of the hearings or a suitable substitute, the record does not reveal the parties' arguments to the court or any concessions concerning the facts, issues and evidence. Moreover, where, as here, the record on appeal consists entirely of a clerk's transcript, the scope of review is limited. (*In re Marriage of Stutz* (1981) 126 Cal.App.3d 1038, 1042.) "'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted; *Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.)

Given that we must indulge all presumptions in favor of the preliminary injunction, we cannot conclude that the trial court abused its discretion by issuing the injunction. There are exceptions to the merger doctrine and the court expressly found that "[i]t is not at all clear that the easement was extinguished" when Mack obtained title to the Tariwala Property. There may have been evidence adduced during the hearings or concessions made by the parties that precipitated this decision. Among other things, the court may have clarified that it was considering the documents attached to Tariwala's declaration. Without any record of what occurred at the hearings, we must uphold the

order.[4] (See, e.g., *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [order denying preliminary injunction dissolution affirmed based on lack of reporter's transcript].)

DISPOSITION

The order granting plaintiffs' request for a preliminary injunction is affirmed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

[4] Mack does not appear to challenge the trial court's finding that plaintiffs likely would suffer irreparable harm in the absence of a preliminary injunction. It is apparent from the record that plaintiffs have been irreparably damaged by Mack's blocking of the driveway easement as they have no other means of accessing their property.

Vincent O'Neill, Judge
Superior Court County of Ventura

Keith Martin Mack, in pro. per, for Defendant and Appellant.

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